In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 460

SHELBY LOUIS POLLACK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 1970. The petition for a writ of certiorari was filed on July 28, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court abused its discretion in denying a continuance requested by petitioner on the day of trial.

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2. Whether a witness' in-court identification of petitioner was tainted by prior photographic displays at which the witness had failed to identify petitioner from the photographs.

STATEMENT

After a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of sixteen counts of mail fraud (18 U.S.C. 1341) and of conspiracy to commit that offense (18 U.S.C. 371). He was sentenced to three years' imprisonment. The court of appeals affirmed *per curiam*.

The evidence showed a scheme to obtain goods on credit with no intention to pay. The goods were ordered in the name of various companies for whom credit was established by giving companies which were merely answering services as references. One Roseman, indicted with petitioner, established the credit references using various names (R. 47–80; 112–115).*

During the summer of 1968 in Florida, a secretary worked for Roseman and petitioner, whom she knew as Mike, initially in the back of co-defendant Silver's store and then at her home, sending for lists and later for merchandise (R. 135–138). She heard Roseman tell petitioner he would not deal with a particular company because it required payment in advance (R. 138). Petitioner was identified as having picked up furniture and steel shelving ordered by one of the companies at a warehouse (R. 225–227, 239-241). Expert testimony established that petitioner's handwrit-

*"R." refers to the transcript of the record, filed with this Court.

ing was on some orders (R. 310–315, see R. 396–397) and his fingerprints on another (R. 324–326). Petitioner sold the fraudulently purchased items to retailers (R. 250, 254–256, 273–274, see also R. 344–349).

ARGUMENT

1. On August 6, 1969, the day of trial, Roseman was taken to the hospital, critically ill from a heart condition. (R. 2–3). Petitioner moved for a continuance on the ground that the attorney he expected to try the case was not available (R. 5). He also claimed that Roseman was an indispensable witness and requested an "evidentiary hearing" on the issue (A. 8). Roseman apparently had indicated previously that he would not be a witness if the case were jointly tried, but that, if his case were disposed of first, he would testify for petitioner (R. 10, 19). The court asked for a report on Roseman's condition and proceeded with selection of a jury (R. 14–16).

After the jury had been selected, a doctor who had examined Roseman testified that it would be two to six months before Roseman could be subjected to cross-examination and that Roseman was then unable to furnish a statement as to whether he would testify for petitioner (R. 536–539). The court then ordered Roseman's case severed and went forward with the trial of petitioner and Silver (R. 34–36).

The trial judge did not abuse his discretion in declining to order a continuance of petitioner's trial. His request actually was to be tried after trial or other disposition of Roseman's case. Yet he presented no factors, other than the hope that Roseman would tes-

tify on his behalf, in support of his request. And he presented the request on the day of trial without any affidavits to support his hope that Roseman would testify.

The instant case is not like *United States* v. *Echeles*, 352 F. 2d 892 (C.A. 7), where the court held that a severance and continuance were required in order to enable the defendant to obtain the benefit of the testimony of a co-defendant who had testified that the defendant was innocent in a previous trial. Here the indications that Roseman would testify favorably for petitioner were far weaker and the delay which would be necessitated by a continuance far greater than in *Echeles*. See *United States* v. *Kahn*, 366 F. 2d 259, 263–264 (C.A. 2), certiorari denied, 385 U.S. 948; *Brown* v. *United States*, 375 F. 2d 310, 316 (C.A. D.C.), certiorari denied, 388 U.S. 915; see also generally, *Leino* v. *United States*, 338 F. 2d 154 (C.A. 10); *Blackwell* v. *United States*, 405 F. 2d 625 (C.A. 5).

2. At trial, witnesses Iacobucci and McElhaney identified petitioner as one of two men who had come to a warehouse to pick up a load of freight in connection with the mail fraud scheme (Pet. 5). Iacobucci had previously been unable to identify petitioner from a series of photographs shown two months after the incident and was unable to identify a single photograph of petitioner on the morning of trial. During a recess in the trial prior to his testimony, however, Iacobucci recognized petitioner in the corridor when he unexpectedly encountered him. He was standing with Mr. McElhaney. No police officers were present. Both witnesses

indicated they recognized petitioner; Iacobucci did so first (R. 244–246).

Under these circumstances, the prior photographic displays did not create an irreparable likelihood of misidentification at trial, as petitioner claims. See *Simmons* v. *United States*, 390 U.S. 377. Iacobucci had not seen petitioner in person since the incident at the warehouse. When he confronted him again live, in a situation in which he did not anticipate seeing suspects or pictures of suspects, Iacobucci identified him spontaneously. Defense counsel elicited the facts regarding Iacobucci's unsuccessful attempts at photographic identification on cross-examination (R. 242-246). Thus, the jury was in a position accurately to assess the strength of Iacobucci's identification at trial. Finally, even if admission of Iacobucci's identification was error, it was harmless in light of McElhaney's unchallenged identification and the other evidence of petitioner's guilt. See *Harrington* v. *California*, 395 U.S. 250; *Chapman* v. *California*, 386 U.S. 18.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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